



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE  
Washington State Habitat Office  
510 Desmond Drive SE, Suite 103  
Lacey, WA 98503

December 20, 2011

Michelle Walker  
Regulatory Branch CENWS-OD-RG  
U.S. Army Corps of Engineers  
Post Office Box 3755  
Seattle, Washington 98124-3755

Re: Proposed regional conditions for the nationwide permits

Attention: Kristina Tong

Dear Ms. Walker:

The U.S. Army Corps of Engineers (COE) Seattle District is seeking comments on the proposed regional conditions for the 2012 nationwide permits (NWP), published in a special public notice (issued September 1, 2011). The Washington State Habitat Office of the National Marine Fisheries Service (NMFS) is pleased to provide comments on the regional conditions proposed by the Seattle District.

## **Background**

Section 404(e) of the Clean Water Act provides the statutory authority for the Secretary of the Army, after notice and opportunity for public hearing, to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States. Activities authorized by NWPs must be similar in nature, cause only minimal adverse environmental effects when performed separately, and cause only minimal cumulative adverse effect on the aquatic environment. Regional conditions may be imposed by division engineers to take into account regional differences in aquatic resource functions and services across the country and to restrict the use of NWPs to protect those resources. Regional conditions may also restrict or prohibit the use of an NWP in certain waters or geographic areas, if the use of that NWP in those waters or areas might result in more than minimal individual or cumulative effects on the aquatic environment.

The Seattle District formed an interagency work group in the fall of 2010 to assist them in developing proposed regional conditions. In February 2011, the Seattle District sought comments on their proposed regional conditions published in a special public notice, and NMFS provided comments on April 8, 2011. NMFS appreciates the opportunity to participate in the interagency work group, and to provide comments on the regional conditions as currently proposed by the Seattle District.



## **General Regional Conditions (apply to all NWP)**

In addition to NWP 3 (maintenance) and NWP 13 (bank stabilization), several NWPs authorize shoreline armoring or bank stabilization activities. NMFS finds it appropriate to have general regional conditions that restrict or prohibit the use of NWPs for shoreline armoring or bank stabilization activities given the importance of marine and freshwater shorelines to the long-term survival and recovery of salmon and steelhead populations which have been listed as threatened or endangered under the Federal Endangered Species Act (ESA); the extent of shoreline armoring already present in Puget Sound and along many of the rivers designated as critical habitat for ESA-listed salmonids; the cumulative impacts of even small-scale armoring activities; and the significant adverse effects resulting from shoreline armoring on salmonids and their prey.

Individual permit reviews for these types of potentially harmful actions will provide a more appropriate forum for assessing direct, indirect and cumulative effects; and for considering less damaging alternatives and mitigation options that are usually not considered in the abbreviated NWP process. Therefore, NMFS recommends the Seattle District adopt restrictive general regional conditions that:

1. Preclude new shoreline armoring or bank stabilization activities in all waters with ESA-listed salmonids or designated critical habitat for salmonids; and
2. Prevent further shoreline modification from repair and replacement activities that go beyond previously approved footprints, in all waters with ESA-listed salmonids or designated critical habitat for salmonids.

Additionally, several NWPs allow for the loss of no more than 300 linear feet of stream bed, which includes perennial, intermittent, and ephemeral stream beds. For intermittent and ephemeral stream beds, the NWPs allow for the District Engineer to waive the 300 linear foot limit. The Seattle District has proposed regional conditions to not allow the waiver and to set a strict limit of 300 linear feet for intermittent and ephemeral stream beds. NMFS supports the adoption of these regional conditions, provided the permitted changes to intermittent and ephemeral stream beds would have little or no potential effects on fish-bearing waters downstream. However, this would still allow for a loss of up to 300 linear feet of perennial stream beds. Although the Seattle District believes it has adequate measures in place so that proposed projects would get the appropriate review, it is difficult to envision a loss of up to 300 linear feet of a fish-bearing perennial stream bed that would meet the requirements of activities authorized by NWPs: to “cause only minimal adverse environmental effects when performed separately, and cause only minimal cumulative adverse effect on the aquatic environment.” NMFS recommends a general regional condition requiring that no fill be permitted within fish-bearing perennial streams. Projects resulting in fill in fish-bearing perennial streams have a high potential for adverse effects; individual permit review would ensure that appropriate minimization and mitigation measures, if necessary, would be implemented.

## **NWP 48 Regional Conditions**

Regional conditions proposed by the USACE are more restrictive than the national NWP guidelines proposed, disallowing expansion of shellfish farms without an individual permit. Previous consultation between the USACE and NMFS under NWP 48 has sufficiently addressed NMFS resource concerns related to shellfish aquaculture in Washington State waters, and conservation measures were previously developed to ensure that species listed under the ESA and the habitat resources upon which they depend would not be adversely affected by this practice. These measures could be applied directly to farm expansions to address habitat and species concerns without the requirement of an individual permit. Further, under NWP 48 PCNs are already required for activities with potential to raise additional concerns (e.g., new species cultivated in a waterbody) that could be similarly applied. Therefore, in Washington State, NMFS does not believe it necessary to require an individual permit for farm expansion into lands adjacent to an existing farm's footprint.

## **Compliance with the Endangered Species Act and Magnuson-Stevens Fishery Conservation and Management Act**

It has been impossible for NMFS to independently assess the cumulative effects of issuing NWPs on designated critical habitat and species listed under the ESA, and on essential fish habitat (EFH) under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The issuance of NWPs is not tracked by the COE in such a way that NMFS can readily determine which projects received a general permit, how compliance with the ESA and MSA was met (programmatic or individual consultation, if any), and what the individual or cumulative effects of the permitted project are on ESA-listed species, designated critical habitat, and EFH. NMFS recommends that the Seattle District form a work group with representation from the COE, NMFS and U.S. Fish and Wildlife Service to develop a method to track the issuance of NWPs, how ESA and MSA compliance was met, and a brief description of the extent of effects for each project that was issued a NWP, over a period of 3 years.

We thank you for the opportunity to provide these comments on the proposed regional conditions for the nationwide permits. We look forward to continued coordination with the Seattle District's interagency work group in developing final regional conditions. Please contact Tami Black at 360 753-6042, [tami.black@noaa.gov](mailto:tami.black@noaa.gov) if you would like to discuss these issues further.

Sincerely,



Steven W. Landino  
Washington State Habitat Director  
for Habitat Conservation